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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VUONG PHAN, Defendant and Appellant.	A158287 (Alameda County Super. Ct. No. 173309B)

Defendant Vuong Phan was charged with murder after participating in a robbery during which one of his co-defendants killed another man. Phan pleaded guilty to voluntary manslaughter and admitted being armed with a firearm during the offense, and he was sentenced to 12 years in prison.

The Legislature subsequently enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437) (Stats. 2018, ch. 1015), which altered liability for murder under the theories of felony murder and natural and probable consequences. The bill also established a procedure, under newly enacted Penal Code[1] section 1170.95, for eligible defendants to petition for recall and resentencing. Phan filed a petition for relief, and the trial court denied it on the basis that section 1170.95 is inapplicable to defendants convicted of voluntary manslaughter.

[1] All further statutory references are to the Penal Code.

On appeal, Phan claims that the order denying his petition must be reversed because "[l]imiting relief under section 1170.95 to murder convictions is contrary to the purposes of Senate Bill [No.] 1437, contravenes the express legislative intent underlying the new law, would lead to absurd results, and violates equal protection." We recently rejected in an unpublished opinion similar arguments in affirming the denial of a petition for resentencing under section 1170.95 brought by a co-defendant of Phan's, who also entered a plea to voluntary manslaughter, and we again conclude that the statute does not by its plain terms apply to defendants convicted of that crime. Nor are we persuaded by Phan's constitutional argument. We therefore affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Phan participated in the robbery of an Oakland massage parlor. During the robbery, one of his co-defendants, Curtis Yee, shot and killed a man, and another co-defendant, Lae Lockeaphone, drove Yee and Phan away from the scene.[2] Phan was charged with murder with an accompanying allegation that he was armed with a firearm.[3]

In August 2016, as part of a plea agreement, Phan pleaded guilty to voluntary manslaughter and admitted the firearm enhancement.[4] In

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[2] This division affirmed Yee's murder conviction in 2018. (*People v. Yee* (Sept. 11, 2018, A150532) [nonpub. opn.].) Earlier this year, this panel affirmed the denial of Lockeaphone's petition under section 1170.95. (*People v. Lockeaphone* (Apr. 28, 2020, A157520) [nonpub. opn.].)

[3] The murder count was brought under section 187, subdivision (a), and the firearm enhancement was alleged under section 12022, subdivision (a)(1).

[4] The voluntary-manslaughter conviction was under section 192, subdivision (a).

exchange for his testimony at Yee's trial, Phan was sentenced to 12 years in prison.[5]

While Phan was serving his sentence, the Legislature passed Senate Bill No. 1437. In March 2019, after the new legislation went into effect, Phan filed a petition under section 1170.95, averring that he was entitled to relief because he "pled guilty or no contest to 1st or 2nd degree murder in lieu of going to trial because [he] believed [he] could have been convicted of 1st or 2nd degree murder at trial pursuant to the felony murder rule or the natural and probable consequences doctrine." The trial court appointed counsel for Phan and ordered the People to file a response to the petition. After receiving briefing and holding a contested hearing, the court denied the petition on the basis that because Phan was not convicted of murder, he failed to make a prima facie showing of entitlement to relief.[6]

II.
DISCUSSION

A. Senate Bill No. 1437

"Effective January 1, 2019, Senate Bill [No.] 1437 amended murder liability under the felony-murder and natural and probable consequences

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[5] Phan's abstract of judgment is not in the record before us, but the parties agree that he in fact received a 12-year sentence.

[6] At the same hearing, the trial court also addressed and denied petitions by four other defendants raising the same issue. This court has issued decisions affirming the denial of three of those petitions, including one decision by this panel. (*People v. Camacho* (Jun. 12, 2020, A158268) [nonpub. opn.]; *People v. Cortez* (May 28, 2020, A158264) [nonpub. opn.]; *People v. Housley* (May 7, 2020, A158286) [nonpub. opn.].) The fourth defendant's appeal is pending in Division Three of this court. (*People v. Martinez*, A158265.) The petition of a fifth other defendant, who was convicted of attempted murder, was also heard and denied at the same hearing, and her case is currently on review in the Supreme Court. (*People v. Allen* (Mar. 25, 2020, A158267) [nonpub. opn.], review granted July 10, 2020, S262471.)

theories. The bill redefined malice under section 188 to require that the principal acted with malice aforethought. Now, '[m]alice shall not be imputed to a person based solely on his or her participation in a crime.' (§ 188, subd. (a)(3).)" (*People v. Turner* (2020) 45 Cal.App.5th 428, 433 (*Turner*).) The bill also amended section 189 to provide that a defendant who was not the actual killer and did not have an intent to kill is not liable for felony murder unless he or she "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(3).)

Senate Bill No. 1437 also enacted section 1170.95, which authorizes "[a] person convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" so long as three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).) Any petition that fails to make "a prima facie showing that the petitioner falls within the provisions of [section 1170.95]" may be denied without a hearing. (§ 1170.95, subds. (c) & (d).)

B. Section 1170.95 Does Not Apply to Defendants Convicted of Voluntary Manslaughter.

Phan claims that section 1170.95 applies to any defendant who, like he, was convicted of voluntary manslaughter after "accept[ing] a plea offer in lieu of going to trial in a case where he was charged with and could have been convicted of murder under a theory of felony murder." For purposes of this appeal, we will assume, without deciding, that Phan can establish he was charged based on a theory of felony murder and could no longer be convicted of that crime after Senate Bill No. 1437.

Phan's eligibility for relief under section 1170.95 is a question of law that we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *Turner*, *supra*, 45 Cal.App.5th at p. 435.) " ' "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." ' " (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.) We first consider the statutory language, " ' "giving [it] a plain and commonsense meaning." ' " (*Ibid.*) " ' " 'When [that] language . . . is clear, we need go no further.' [Citation.] But where a statute's terms are unclear or ambiguous, we may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' " ' " (*Ibid.*)

Section 1170.95 allows "[a] person *convicted of felony murder or murder under a natural and probable consequences theory*" to file a petition "to have the petitioner's *murder conviction* vacated." (§ 1170.95, subd. (a), italics added.) And should the trial court find that the petitioner has made a prima facie showing of entitlement to relief and issue an order to show cause, it "shall hold a hearing to determine whether to vacate the *murder conviction*

and to recall the sentence" (§ 1170.95, subd. (d)(1), italics added), unless the parties "waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her *murder conviction* vacated." (§ 1170.95, subd. (d)(2), italics added.)

Relying on the italicized language, the Second and Fourth District Courts of Appeal, and more recently our colleagues in Division Two of this court, have concluded that a person convicted of manslaughter is not entitled to relief under section 1170.95's plain terms. (*People v. Paige* (2020) 51 Cal.App.5th 194, 202 (*Paige*); *People v. Sanchez* (2020) 48 Cal.App.5th 914, 920 (*Sanchez*); *Turner*, *supra*, 45 Cal.App.5th at p. 432; *People v. Flores* (2020) 44 Cal.App.5th 985, 993; *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887.) Using similar reasoning, appellate courts have concluded that section 1170.95 does not apply to a person convicted of attempted murder. (E.g., *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1017, review granted Mar. 11, 2020, S259948; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104, review granted Nov. 13, 2019, S258175.)

Phan argues that although section 1170.95 "appears, at first glance, to limit the class of persons eligible for relief to those who were convicted of murder," subdivision (a)(2) of the statute creates an ambiguity because it refers to a "broad[er] category of persons" eligible for relief. Subdivision (a)(2) of the statute provides that one requirement for relief is that "[t]he petitioner was convicted of first degree or second degree murder following a trial *or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder*." (§ 1170.95, subd. (a)(2), italics added.) Since the italicized language does not mention a murder conviction, Phan reasons that it includes defendants who pleaded to manslaughter after being charged with murder based on a theory that Senate Bill No. 1437

abolished. He argues that we must resolve the supposed ambiguity in his favor to avoid rendering the italicized language surplusage.

Phan fails to present compelling reasons to depart from section 1170.95's unambiguous language limiting relief to petitioners convicted of murder. Reading subdivision (a)(2) to include a person convicted of voluntary manslaughter after a plea is inconsistent with the rest of section 1170.95, particularly because it "ignores the introductory language in . . . subdivision (a) that limits petitions to persons 'convicted of . . . *murder*.' " (*Turner*, *supra*, 45 Cal.App.4th at p. 436.) Even if subdivision (a)(2) could have been drafted more concisely, to refer simply to petitioners "convicted of first or second degree murder," "the rule against surplusage will be applied only if it results in a *reasonable* reading of the legislation." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 234–235.) As we have said, interpreting subdivision (a)(2) to include a person convicted of voluntary manslaughter after a plea conflicts with section 1170.95's other provisions.[7] For this reason, we decline to apply the rule against surplusage to interpret subdivision (a)(2) in a manner at odds with the rest of the statute.

Having concluded that section 1170.95 unambiguously applies only to petitioners convicted of murder, we need not address Phan's remaining

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[7] In any case, the reference to trials and pleas in section 1170.95, subdivision (a)(2), is not surplusage to the extent it clarifies that petitioners who entered pleas to murder are also eligible for relief. Similar clarification can be found in other ameliorative statutes that specify they apply to petitioners convicted of a qualifying crime "whether by trial or plea." (E.g., § 1170.18, subd. (a) [petitions for relief under Proposition 47].) While the Legislature could have echoed this language in subdivision (a)(2), we do not agree with Phan that its failure to do so supports his interpretation of section 1170.95.

arguments in depth. Phan argues that the Legislature's broader purpose of including those convicted of manslaughter can be seen from its uncodified findings and declarations, in which it stated its objective of making "statutory changes to more equitably sentence offenders in accordance with their involvement in *homicides*," not just murders, as well as its reaffirmance that "a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018, ch. 1015, § 1, subds. (b) & (d), italics added.) As *Paige* pointed out, however, other portions of the same uncodified section of the bill repeatedly refer only to "murder" and "murder liability" (*Paige*, *supra*, 51 Cal.App.5th at p. 203), undercutting Phan's argument.

In any case, the relevant question is whether the Legislature intended to provide relief to petitioners with such convictions, not whether a more expansive reading of the statute can be reconciled with the bill's basic purpose. As the Fourth District explained in *Turner*, the legislative history of Senate Bill No. 1437 confirms that the Legislature did not intend to include those convicted of manslaughter. (*Turner*, *supra*, 45 Cal.App.5th at pp. 436–438; accord *Paige*, *supra*, 51 Cal.App.5th at p. 203.) We find *Turner*'s reasoning on this point persuasive, and Phan offers us no reason to depart from it.

We also reject Phan's claim that interpreting section 1170.95 to exclude those convicted of manslaughter will lead to absurd results. Phan argues that doing so here is "illogical" and "fundamentally unfair," because it means he will serve a longer sentence as a result of pleading to voluntary manslaughter instead of to murder, since if he filed a successful petition under section 1170.95 he would avoid a homicide conviction upon resentencing. Again, we find *Turner* persuasive on this point. As that

decision explained, interpreting section 1170.95 to exclude those convicted of manslaughter does not "produce absurdity by undermining the Legislature's goal to calibrate punishment to culpability. The punishment for manslaughter is already less than that imposed for first or second degree murder, and the determinate sentencing ranges of 3, 6, or 11 years for voluntary manslaughter and two, three[,] or four years for involuntary manslaughter permit a sentencing judge to make punishment commensurate with a defendant's culpability based on aggravating and mitigating factors. [Citations.] Providing relief solely to defendants convicted of *murder* under a felony-murder or natural and probable consequences theory does not conflict with the Legislature's stated objective to make 'statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.' " (*Turner*, *supra*, 45 Cal.App.5th at p. 439, quoting Stats. 2018, ch. 1015, § 1, subd. (b); accord *Paige*, *supra*, 51 Cal.App.5th at p. 204.)

Finally, we disagree with Phan that interpreting section 1170.95 to exclude those convicted of manslaughter violates equal protection under the federal and state constitutions. Phan contends that, despite case law holding that defendants convicted of different crimes are generally *not* similarly situated, "[p]ersons who committed crimes during which an accomplice killed someone are similarly situated for purposes of culpability, regardless of whether they went to trial and were convicted under a now-invalid first degree felony murder theory, pled to some degree of murder, or pled to voluntary manslaughter." He also argues that "there is no rational basis, much less a compelling justification, for excluding individuals like [him] from relief under Senate Bill [No.] 1437."

Other decisions have rejected equal-protection claims raised by defendants who were convicted of voluntary manslaughter but nevertheless

sought relief under section 1170.95. (*Paige*, *supra*, 51 Cal.App.5th at pp. 205–206; *Sanchez*, *supra*, 48 Cal.App.5th at pp. 920–921; *People v. Cervantes*, *supra*, 44 Cal.App.5th at pp. 888–889.) Phan does not even mention the equal-protection analysis of these three decisions, much less offer any reason not to follow them, even though *Cervantes* was filed before he filed his opening brief and the other two decisions were filed before he filed his reply brief. We therefore follow those decisions and conclude that construing section 1170.95 to exclude defendants convicted of manslaughter does not violate equal protection.

We recognize that barring defendants who entered a plea to manslaughter from pursuing relief under section 1170.95 might lead to situations in which they receive longer sentences than they would have had they gone to trial and been convicted of murder. We reaffirm, however, that "[t]he remedy for any potentially inequitable operation of section 1170.95 lies with the Legislature," not with this court, as we are bound to follow its clear intent to provide relief only to those convicted of murder. (*People v. Munoz* (2019) 39 Cal.App.5th 738, 760, review granted Nov. 26, 2019, S258234; see *Turner*, *supra*, 45 Cal.App.5th at pp. 440–441.)

III.
DISPOSITION

The order denying Phan's section 1170.95 petition is affirmed.

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Humes, P.J.

WE CONCUR:

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Banke, J.

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Sanchez, J.

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